Supreme Court, U. S.
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in the

Supreme Court

of the

United States

JANUARY TERM, 1980

NO. 79-1275

JORGE ORTIZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A BRIEF OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOEL H. BROWN, ESQUIRE
BROWN, HUYSMAN & MATTHEWS
Attorneys for Petitioner
2000 South Dixie Highway
Suite 101
Miami, Florida 33133
Telephone: (305) 854-3530

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jorge Ortiz prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 21, 1980.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 2494, is reported in (case citation not available).

JURISDICTION

The matter was tried before a jury in the district court and no reported opinion or decision exists. The judgment of the Circuit Court of Appeals was entered on January 21, 1980, p. 2494, infra. The jurisdiction of this Court is invoked under 28 United States Code, Sec. 1254(1).

QUESTIONS PRESENTED

Whether the government failed to prove beyond a reasonable doubt that the substance seized was a Schedule II narcotic, to-wit: L-cocaine.

Whether the government failed to prove beyond a reasonable doubt that the defendant had constructive possession or aided and abetted others in possessing with the intent to distribute a controlled substance.

STATUTES INVOLVED

The statutory provision involved is Title 21, U.S.C., §812(a) and (c) Schedule II(a)(4).

STATEMENT

An indictment charging Petitioner and two others, Tony Gonzalez and Jose Antonio Egus, with (1) conspiracy to possess with the intent to distribute and distribute cocaine in violation of Title 21, U.S.C., §846 and (2) possession with intent to distribute cocaine and (3) distribution of cocaine in violation of Title 21, U.S.C., §841(a)(1) and Title 18, U.S.C., Section 2 was filed on August 30, 1978. The jurisdiction of the District

Court was invoked because the Petitioner was arrested by the Drug Enforcement Administration and charged with federal crimes under Title 21 and Title 18 of the United States Code governing Crimes and Criminal Procedure.

At the trial, the government's first witness, Special Agent Armando Marin testified that he had been a special agent of the D.E.A. for four years and that while working undercover he met the Petitioner on August 11, 1978 [III R.T. 162].[1] Pursuant to information he received from a cooperating individual [III R.T. 163], he met the Petitioner at the Doral Beach Hotel on Miami Beach, at 7:00 o'clock that evening [III R.T. 164 and 189]. At that meeting, there was a conversation between Marin and the Petitioner in which the sale and purchase of 20 kilos of cocaine at a price of $45,000.00 per kilo was discussed [III R.T. 165]. Marin thought the price was high and the Petitioner responded he could not lower it without calling other people [III R.T. 166]. Marin argued the price and place and time of delivery with the Petitioner [III R.T. 166-167].

Subsequently, Marin went to an address in Southwest Dade and waited for the Petitioner to arrive, which he did between the hours of 1:00 and 1:30 the following morning [III R.T. 168]. At that time, Petitioner introduced to Marin, Jose Antonio Egus and Tony Gonzalez, who handed Marin approximately one pound of cocaine [III R.T. 173]. Marin testified that he was upset and did not want a sample but rather wanted the full 20 kilos [III R.T. 201]. To which Egus responded that Marin could inspect the sample while he, Egus, got

[1]III, R.T. refers to Reporter's Transcript, Vol. III.

the rest [III R.T. 174]. Marin stated that he did not wish to pay $45,000.00 per kilo, which resulted in an argument between Egus and Petitioner as to why Petitioner said $45,000.00 when the price was $43,000.00 per kilo [III R.T. 174 and 178]. Marin then stated that he did not wish to deal and Egus grabbed the cocaine and left with Gonzalez and Petitioner [III R.T. 175 and 181]. Special Agent Marin further testified that Ortiz returned alone to Marin in about 30 seconds and told him that he would try to straighten things out [III R.T. 175 and 181]. Egus and Gonzalez were arrested [III R.T. 175] and Petitioner was arrested with Marin [III R.T. 202].

The next and last witness called by the prosecution was William David Beazley, a forensic chemist with the D.E.A. who testified as to the nature of the substance seized and introduced by the Government into evidence [III R.T. 203-235]. Mr. Beazley testified on direct examination that he had been in the employ of the D.E.A. for approximately three and one-half years and that earlier he had worked for the State of Tennessee and the University of Tennessee for the period of approximately two and one-half years and that he received his B.S. and M.S. degrees in Chemistry [III R.T. 203]. Mr. Beazley further stated that he performed five tests on the substance, to-wit: (1) a microscopic examination, (2) crystal test; (3) gas liquid chromatography; (4) infrared spectograph; and (5) optical rotation, using a polarimeter [III R.T. 205].

On cross-examination, Mr. Beazley explained that he is in the field of analytical chemistry [III R. T. 211] and that his job is to determine whether an unknown substance is a specific known compound [III R.T. 214].

To determine what an unknown substance is, he must perform physical and chemical tests [III R.T. 215]. In the crystal test, it was necessary to compare the "unknown" crystal with that of a known crystal [III R.T. 215-216]. However, the crystal test did not by itself prove that the "unknown" substance was cocaine [III R.T. 216]. Mr. Beazley stated that the infrared test also required comparison of the unknown substance with a known substance [III R.T. 218].

On cross-examination Mr. Beazley admitted that there were eight isomers of cocaine, to-wit: L-cocaine, D-cocaine, L-pseudo cocaine, D-pseudo cocaine, L-alocaine, D-alocaine, L-pseudo alocaine and D-pseudo alocaine; and that all of these isomers have the same form [III R.T. 224]. Mr. Beazley further stated that only one of the eight (L-cocaine) exists in nature and that it alone is a controlled substance under the present rulings [III R.T. 225]. Mr. Beazley also testified that when making comparison tests he had only two standards, L-cocaine and pseudo cocaine [III R.T. 226 and 231]. His testimony revealed that L-cocaine and six of the other seven isomers will give the same results under the crystal tests [III R.T. 228].

Mr. Beazley stated under cross-examination that there is a difference, based upon untested theory, between L-cocaine and L-alocaine and L-pseudo alocaine [III R.T. 232]. He further stated that these isomers are extremely similar [III R.T. 232] and that he has never seen any difference between them in any test [III R.T. 233]. On re-direct, he stated that, in his opinion, the substance tested was L-cocaine [III R.T. 234].

The Government then introduced into evidence the seized substance and rested [III R.T. 236] whereupon the Petitioner moved for Judgment of Acquittal on the grounds that (1) the Government failed to prove that the evidence seized was L-cocaine [III R 238-240]; (2) that there had been no showing that the Petitioner possessed the subject "cocaine" [III R.T. 241-244]. Said Motions were denied [III R.T. 241 and 299-300]. The jury returned a verdict of guilty as to all three counts. The Petitioner filed his Motion for a New Trial [C.R. 17-21][2] which was denied [C.R. 26].

REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE STATUTORIAL DEFINITION OF COCAINE UNDER 18 U.S.C. §812.

Under Federal Narcotics Law, cocaine is defined as:

> Coca leaves (9040) and any salt compound derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine (9041) or ecgonine (9180) 21 C.F.R. §1308.12, Schedule II (b)(4); See 21 U.S.C. §812 (a) and (c), Schedule II (a)(4).

[2]C.R. refers to the Clerk's Record.

Thus, it was incumbent for the Government to prove beyond a reasonable doubt that the substance seized and introduced as evidence at trial was either a "natural" cocaine derived from coca leaves or a chemical equivalent thereof.

At trial, Government witness, William David Beazley, forensic chemist, testified as to the nature of the substance seized by the government, stating that he performed five tests on the substance, to-wit: (1) a microscopic examination; (2) crystal test; (3) gas liquid chromatography; (4) infrared spectograph; and (5) optical rotation using a polarimeter.

Mr. Beazley testified that there are eight isomers of cocaine, to-wit: L-cocaine, D-cocaine, L-pseudo cocaine, D-pseudo cocaine, L-alocaine, D-alocaine, L-pseudo alocaine and D-pseudo alocaine. He also stated that all possess the same chemical formula but have different spatial arrangements and that only L-cocaine exists in nature. The other seven are synthetic. Mr. Beazley also stated that L-cocaine is the only isomer of the eight that is a controlled substance under present rulings.

On cross-examination, Mr. Beazley testified that he did not have samples of all the isomers needed for the standard comparison procedure in all chemical tests. In fact, he stated that he only had two, pseudo cocaine and L-cocaine. Under cross-examination, Mr. Beazley admitted that he could say that the substance he tested showed a consistency with L-cocaine and could not state

to a scientific certainty whether the substance he tested could also show a consistency to any or all of the other isomers.

It is Petitioner's contention that the tests were inconclusive in that they could not distinguish between the "uncontrolled" and "controlled" substance. In *U.S. v. Hall,* 552 F.2d 273 (1977), the chemical expert, Mr. Shapiro, testified that D-cocaine is not the chemical equivalent to L-cocaine, in disagreement with another expert, Mr. Medina, who stated that a polarimeter test would produce some differences but that the substances were chemically equivalent. The Court then stated that the chemical equivalency issue was not raised at trial or in that court and refused to decide whether the instructions to the jury leaving the issue up to them to decide on circumstantial evidence as a matter of fact was proper. Petitioner here contends that this is a matter beyond the ability of a lay jury to decide since it is highly technical in nature in that expert witnesses disagree on such a basic issue of legality. The Court in *U.S. v. Hall,* supra, most likely also believed this since it claimed that the jury was able to use other circumstantial evidence to convict i.e., that since the defendant was involved in a smuggling operation it could be reasonably inferred that he was in the possession of cocaine. This is not the case of Petitioner in the case at bar.

The issue of chemical equivalency was again presented in *U.S. v. Orzechowski,* 547 F.2d 978 (1977), where the court again skirted the issue. Conflicting expert testimony again failed to determine to a reasonable scientific certainty which isomer was presented into evidence by the Government. The Court

decided again that an exigent circumstance, to-wit: the testimony that the Defendant represented the white powder as "good quality" cocaine could give the jury another basis for conviction i.e., intent. In the case at bar there are no exigent facts for the jury to base its decision. The jury relied on a single expert whose testimony was inconclusive at best to convict on an issue which has gone virtually undecided in the courts because of the vagueness of the statute involved.

2.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF WHAT CONSTITUTES CONSTRUCTIVE POSSESSION.

Assuming arguendo, that the substance seized and introduced as evidence was L-cocaine, the Government had the burden of proving beyond a reasonable doubt that the Petitioner had constructive possession of the substance or that he aided and abetted others in possessing the substance in order for a verdict of guilty to be properly entered against Petitioner under Count III of the Indictment. The Petitioner recognizes that in addressing this issue this Court must view the evidence and all reasonable inferences therefrom in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). However, the Fifth Circuit Court of Appeals has recently stated in *United States v. Marable,* 574 F.2d 224 (5 Cir. 1978):

> "In circumstantial evidence cases, the inferences reasonably drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence". *United States v. Marable,* supra, at 228-229 and note 1.

In addition, the Fifth Circuit Court of Appeals in *United States v. Maspero,* 496 F.2d 1354 (5 Cir. 1974) has stated:

> "Possession can be constructive as well as actual. The hallmark of constructive possession is some measure of dominion and control over the contraband. Dominion and control can be exclusive or shared." *United States v. Maspero,* supra, at p. 1359.

The evidence in the case under review clearly indicates that Petitioner never had actual physical possession of the substance seized. Special Agent Marin testified that the price could not be lowered without calling other people. He further testified that Mr. Gonzalez produced the cocaine and that Mr. Egus indicated he could get more. Mr. Egus was extremely upset by Petitioner's attempt to raise the price indicating that Petitioner did not have any authority to exercise dominion or control over the substance.

The record clearly shows that Petitioner never had actual possession and no constructive possession can be reasonably inferred by testimony presented. Special Agent Marin's testimony absolutely negates any inference that the Petitioner exercised any dominion and/or control over the substance or that he had the

ability to reduce it to his possession at any time. The Government failed to prove beyond a reasonable doubt that Petitioner had possession of the substance and therefore the decision by the jury was inconsistent with the law as stated in *Glasser v. United States,* supra; *United States v. Marable,* supra; and *United States v. Maspero,* supra, in that no reasonable jury could deduce guilt from the facts presented.

CONCLUSION

For the foregoing reasons, the Petitioner requests that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

JOEL H. BROWN, ESQUIRE
BROWN, HUYSMAN &
MATTHEWS
Attorneys for Petitioner
2000 South Dixie Highway
Suite 101
Miami, Florida 33133
Telephone: (305) 854-3530

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was hand-delivered on this day of February, 1980 to: Asst. U.S. Atty, Linda Collins Hertz, 300 Ainsley Building, 14 N.E. First Avenue, Miami, Florida, 33132.

BROWN, HUYSMAN &
MATTHEWS
Attorneys for Petitioner

By /s/ Joel H. Brown
JOEL H. BROWN

Appendix

APPENDIX A — STATUTES

1. Title 18, U.S.C. §2

   (a) Whoever commits an offense against the United States or aids, abets, counsels commands, induces or procures its commission is punishable as a principal.

   (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. Title 18, U.S.C. Chapter 402, §5010(b)

   If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in Section 5017(c) of this Chapter.

3. Title 21, U.S.C. §812(a) and (c); Schedule II (a)(4)

   Coca leaves (9040) and any salt, compound derivative, or preparation of coca leaves, and any salt, compound derivative or preparation thereof which is chemically equivalent or identical with any of these substances, except

that the substances shall not include decocainized coca leaves, which extractions do not contain cocaine (9041) or ecqonine (9180)

4. Title 21, U.S.C. §841(a)(1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally — (1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance.

5. Title 21, U.S.C. §846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX B — OPINION

Attached hereto

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jorge ORTIZ,
Defendant-Appellant.

No. 79-5125

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1980.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Wm. M. Hoeveler, J., of distribution of cocaine, possession with intent to distribute cocaine and conspiracy to distribute or possess cocaine with intent to distribute, and he appealed as to the distribution and possession counts. The Court of Appeals held that: (1) chemist's identification based on accepted scientific knowledge rather than on personal experience through performing a "comparative analysis" for each synthetic isomer of cocaine was sufficient beyond a reasonable doubt to establish identification of substance as being the concededly illegal isomer of cocaine rather than an allegedly legal form, and (2) contention as to sufficiency of evidence to establish possession of cocaine with intent to distribute would be rejected under concurrent sentence doctrine.

Affirmed.

1. Criminal Law — 1144.13(3), 1159.2(10)

Contention on appeal that substance which defendant was charged with possessing and distributing was not sufficiently shown to be cocaine required Court of Appeals to consider the evidence and all reasonable inferences flowing therefrom in the manner most favorable to the Government and then ask whether jury could reasonably, logically and legally infer from the evidence presented that identification of the substance was established beyond a reasonable doubt.

2. Drugs and Narcotics — 123

In prosecution for distribution of cocaine, chemist's identification based on accepted scientific knowledge rather than on personal experience through performing a "comparative analysis" for each synthetic isomer of cocaine was sufficient beyond a reasonable doubt to establish identification of substance as being the concededly illegal isomer of cocaine rather than an allegedly legal form. Comprehensive Drug Abuse Prevention and Control Act of 1970, §202(c), Schedule II(a)(4), 401(a)(1), 21 U.S.C.A. §§812(c), Schedule II(a)(4), 841(a)(1); Fed.Rules Evid. Rules 703, 803(18), 28 U.S.C.A.

3. Criminal Law — 1177

Where defendant was properly convicted of distribution of cocaine and on that count received sentence to run concurrently with sentences imposed under possession and conspiracy to possess counts, case was a proper one for application of concurrent sentence

doctrine with respect to challenge to sufficiency of evidence to establish defendant's possession of cocaine with intent to distribute.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, KRAVITCH and FRANK M. JOHNSON, Jr., Circuit Judges.

PER CURIAM:

A jury found Jorge Ortiz guilty of (i) distribution of cocaine, in violation of 21 U.S.C.A. §841(a)(1), (ii) possession with intent to distribute cocaine, in violation of 21 U.S.C.A. §841(a)(1), and (iii) conspiracy to distribute or to possess cocaine with intent to distribute, in violation of 21 U.S.C.A. §846. Ortiz was sentenced on each count to an indefinite term of treatment and supervision by the Youth Corrections Division, pursuant to the Federal Youth Corrections Act, 18 U.S.C.A. §5010(b) (Supp.1979), the sentences to run concurrently as to each of the three counts. Appellant does not challenge his conviction on the conspiracy count, but argues on appeal that the evidence was insufficient for conviction on the distribution and possession counts. First, he relies upon his adaptation of the so-called cocaine isomer defense strategy, used at trial. That strategy, he contends, demonstrated that the chemical identification tests used by the government could not adequately distinguish between allegedly legal and concededly illegal forms of cocaine, and that therefore the distribution and possession convictions must fail for want of proof. Second, he challenges his conviction under the possession count, arguing that neither

constructive possession nor aiding and abetting liability were sufficiently evidenced. We reject his first contention, invoke the concurrent sentence doctrine in order to reject the second, and affirm.

The cocaine isomer strategy is no stranger to this Court. The strategy is extensively described in *United States v. Bockius,* 5 Cir., 1977, 564 F.2d 1193, 1194-96. The basis of the strategy is an assumption that only one of eight isomers of cocaine, the L-cocaine isomer, is a "controlled substance" under the federal narcotics laws.[1] All isomers are similar, and it is contended that certain types of government testing procedures are incapable of differentiating the allegedly legal isomers from the concededly illegal isomer, L-cocaine. Past appeals involving the cocaine isomer strategy have revolved around the *type* of identification test performed. Frequently litigated has been the

[1]For this appeal, we assume, without deciding, that only the natural derivative of coca leaves, known as L-cocaine, is a controlled substance under Schedule II of 21 U.S.C.A. §812(c)(II)(a)(4). That statute defines as a controlled substance:

> Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

The case was presented to the jury on the basis that only L-cocaine is illegal, and neither party contests that presentation on appeal. As in *United States v. Bockius, supra* at 1194 n.1, it is unnecessary to construe the scope of the Schedule II definition of cocaine, and we reserve that issue for another day.

government's failure to run a polarimeter test, said to be necessary in order to differentiate between L-cocaine and one of the seven synthetic isomers, D-cocaine.[2] In this case, the government's expert witness did perform a polarimeter test, as well as four other chemical tests.[3]

[1, 2] In this case, Ortiz puts a new twist on the cocaine isomer strategy, but to no avail. In contrast to previous appeals involving the cocaine isomer strategy, Ortiz does not allege a failure to use a certain type of test, such as a polarimeter test. Instead, he argues that the data derived from the tests used is unreliable because the government failed to perform a "comparative analysis" for each synthetic isomer of cocaine. That is, whenever the government runs tests on substances thought to be cocaine, appellant contends that it must assemble at the laboratory known samples of each of the seven synthetic (and allegedly legal) isomers of cocaine, subject all seven plus the unknown substance to the *same* battery of tests, and then directly compare the laboratory data. Otherwise, it is argued, the L-cocaine identification is unreliable. Appellant's sole support for this argument derives from the testimony of the government's expert witness, a forensic chemist, as educed on cross-examination by appellant's attorney.

[2]*United States v. Hall,* 9 Cir., 1977, 552 F.2d 273 (unnecessary to perform polarimeter tests where extensive circumstantial evidence indicated substance was L-cocaine); *United States v. Orzechowski,* 7 Cir., 1977, 547 F.2d 978 (evidence sufficient to establish substance as L-cocaine despite lack of a polarimeter test). *Cf. United States v. Bockius, supra* (recess in trial to perform polarimeter test).

[3]The four other tests performed were: (1) a microscopic examination; (2) a crystal test; (3) gas liquid chromatography; and (4) infrared spectography.

At trial, the government's expert witness testified that only one of the seven synthetic isomers, L-psuedo cocaine, was used in a comparative manner. The witness further explained, however, that a comparative analysis is not the only way to reliably identify chemical substances. Instead, accepted scientific theory predicts that different cocaine isomers will produce differentiable test data. Hence, confusion between L-cocaine and the six isomers which were not directly compared by the chemist[4] was eliminated by resort to accepted scientific theory.[5] On redirect examination, the expert further indicated that he had employed "the accepted and the usual tests performed in [the expert's] field." No controverting evidence — by expert testimony, referenced to learned treatise,[6] or otherwise — was presented by the appellant on this issue. Indeed appellant presented no direct evidence, and the case went to the jury on the government's evidence alone. The deficiencies in the expert's approach were, however, fully argued in defense counsel's closing statement to the jury.

In essence, the chemist's L-cocaine identification was based upon accepted scientific knowledge rather than personal experience. Although the admissibility into evidence of the expert's opinion is not the issue before us, it is noteworthy that F.R.Evid. 703 permits an expert witness to base his or her opinion upon knowledge "reasonably relied upon by experts in the particular field." *See Nanda v. Ford Motor Corp.*, 7 Cir., 1974, 509 F.2d 213, 222; 2 J. Wigmore, Evidence §665b (3d ed. 1940). Here there was uncontroverted an essentially unimpeached testimony which fairly indicated a scientifically accepted basis for the expert witness' chemical identification.

Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704, requires us to consider the evidence and all reasonable inferences flowing therefrom in a manner *most favorable* to the government. Then we ask whether the jury could "reasonably, logically, and legally infer from the evidence presented," *United States v. Bright*, 5 Cir., 1976, 541 F.2d 471, 476, that the L-cocaine identification was established beyond a reasonable doubt. Through *Glasser* spectacles, the expert witness' uncontroverted opinion must be viewed to be both reliable and well-grounded in accepted scientific knowledge. That opinion constituted "substantial" evidence. *See United States v. Malatesta*, 5 Cir., 1979, 590 F.2d 1379 (en banc). So viewed, we have no difficulty whatsoever in finding the evidence sufficient beyond a reasonable doubt to establish the L-cocaine identification. We therefore affirm Ortiz's conviction for distribution of cocaine.

[3] Appellant secondly contests the sufficiency of the evidence used to establish his possession of the cocaine with intent to distribute, although he does not

[4]The remaining six isomers, for which no comparative sample was utilized, are: D-cocaine, L-pseudo alocaine, D-alocaine, L-alocaine, D-pseudo alocaine, and D-pseudo cocaine.

[5]Moreover, the chemist indicated that at least two of the six unobtained isomers were theoretical isomers, not presently in existence. *Cf. United States v. Hall, supra* at 276 (experts testified that they had "never actually found a specimen of d-cocaine [a synthetic isomer].")

[6]*See* F.R.Evid. 803(18) (learned treatise exception to the hearsay rule).

challenge his conviction for conspiracy to commit that offense. This is a proper case for application of the concurrent sentence doctrine. *See United States v. Rubin,* 5 Cir., 1979, 591 F.2d 278; *United States v. Juarez,* 5 Cir., 1978, 566 F.2d 511, 516; *United States v. Alvarez,* 5 Cir., 1977, 548 F.2d 542, 544; *United States v. Buchanan,* 5 Cir., 1977, 544 F.2d 1322, 1325, *cert. denied,* 432 U.S. 907, 97 S.Ct. 2953, 53 L.Ed.2d 1080. Appellant was properly convicted of distribution of cocaine and on that count received a sentence to run concurrently with the sentences imposed under the possession (and conspiracy to possess) counts. *United States v. Hernandez,* 5 Cir., 1979, 591 F.2d 1019 (en banc) applies only to consecutive sentences, *United States v. Cortes,* 5 Cir., 1979, 606 F.2d 511, and Ortiz does not, in any event, seek to apply *Hernandez* to his concurrent sentences. Ortiz's second contention is therefore rejected on the basis of the concurrent sentence doctrine.

AFFIRMED.